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No. 86-1230

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1986

GARY T. HODGES AND
LIBERTY MUTUAL INSURANCE COMPANY,
Petitioners

v.

EVISEA MARITIME CO., S.A.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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RULE 28.1 STATEMENT

Respondent, Evisea Maritime Co., S.A., is a Greek Corporation which has no parent company, subsidiaries, except wholly owned subsidiaries, or affiliates within the meaning of Supreme Court Rule 28.1.

QUESTION PRESENTED

Should the Supreme Court decline to review the decision of the Fourth Circuit, which reversed a jury verdict in favor of a longshoreman against a shipowner and remanded the case for a new trial, because the district court failed to instruct the jury consistent with the law established by this Court in *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981)?

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STATEMENT OF THE CASE

In this factually unusual case, a longshoreman apparently fell into the hold of a vessel in Baltimore, but was not found until the vessel arrived in Newport News the next day. He could not explain how he got there, and nobody will ever know for certain what happened.

Recognizing that this Court had formulated the relative duties of a shipowner and stevedore under the Longshore and Harbor Workers' Compensation Act (hereafter "LHWCA") in *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156 (1981), the Fourth Circuit properly held that the district court must instruct the jury with regard to the shipowner's right to rely on the stevedore, the longshoreman's employer, to control its operation and personnel. There is no need to reexamine this formulation, as it has been well-understood and properly applied by the lower courts with the result that there is no conflict as to the legal issues addressed by the Fourth Circuit in its decision below.

The Respondent, Evisea Maritime Co., S.A. (hereafter "Evisea") wishes to emphasize at the outset that the Petitioners, Gary T. Hodges and Liberty Mutual Insurance Co. (hereafter collectively referred to as "Hodges"), in their Statement of the Case, omit certain evidence presented by Evisea that clearly supports the Fourth Circuit's decision. Evisea showed at trial that the stevedore was aware that the No. 3 tween deck hatch had been left open and that the lights had been turned off only after the stevedore had advised the crew that all work had been completed there, and the crew had closed the No. 3 weather deck hatch. The evidence at trial also showed that after the No. 3 weather deck hatch had been closed, no member of the crew remained in that area or was present in the No. 2 hold, where the stevedore had moved to continue cargo operations, at the time Hodges disappeared. Finally, there was no evidence that the shipowner had knowledge that the stevedore would permit its employees to be in the area of the closed No. 3 hold without fulfilling its obligation to provide lighting to its employees. In short, while both the shipowner and the stevedore knew of the conditions in the No. 3 hold, only the stevedore knew of, and controlled, the movements of its employees into that area.

REASONS FOR DENYING THE WRIT

I. INTRODUCTION

In reversing and remanding the case for a new trial under proper instructions, the Fourth Circuit recognized that there was no evidence that Evisea had any knowledge or reason to believe either that Hodges would be venturing into the No. 3 cargo hold long after work had been completed there, or that the stevedore was not properly supervising its men to assure that they remained in their assigned work area. Therefore, it was mandatory that the district court instruct the jury fully and properly on the respective duties of a shipowner and stevedore to a longshoreman once work has begun, i.e., that the primary burden is on the stevedore to avoid injuries to its employees caused by obvious hazards, and that the shipowner is required to intervene only when it has knowledge both that a dangerous

condition exists *and* that, despite the danger, the stevedore is unreasonably continuing its operation. Because the instructions given by the district court were completely inadequate on this crucial point under *Scindia,* the case was properly reversed and remanded. In doing so, the Fourth Circuit fully complied with both the letter and the spirit of *Scindia.* Moreover, its decision is consistent with the decisions of the other circuit courts which have addressed the issue, and there is no other important reason for hearing this case. Accordingly, Evisea respectfully requests that this Court deny the Petition for a Writ of Certiorari.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE PROPER JURY INSTRUCTIONS IN A SUIT FOR PERSONAL INJURY BY A LONGSHOREMAN AGAINST A SHIPOWNER ARISING UNDER § 905(b) OF THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND THE DECISION BELOW IS CONSISTENT WITH THE LAW OF THIS COURT.

In *Scindia,* this Court explicitly held that in suits brought by longshoremen against shipowners, it is imperative for the trial court to instruct the jury that the stevedore, as opposed to the shipowner, has the primary responsibility for the safety of its longshoremen employees; that the shipowner has a justifiable expectation that the stevedore will discharge that responsiblity; and that the shipowner's duty to intervene in the stevedoring operation arises only if it knows of a danger to which the longshoremen would be exposed *and* that the stevedore's unreasonable continuation to work in the face of such danger is obviously improvident. Since *Scindia,* the circuit courts have assiduously followed this rule of law and held that jury verdicts in favor of an injured longshoreman based on instructions which fail to outline the proper allocation of duties between stevedore and shipowner must be reversed and remanded.

While the appeal of this case was pending in the Fourth Circuit, the United States Court of Appeals for the Second Circuit rendered its decision in *Kakavas v. Flota Oceanica Brasileira S.A.*, 789 F.2d 112 (2d Cir.), *cert. denied,* __ U.S. __, 107 S.Ct. 186 (1986). In *Kakavas,* the court reversed and remanded a jury verdict in favor of an injured longshoreman for reasons sub-

stantially similar to the reasoning of the Fourth Circuit. There, the shipowner requested the trial court to instruct the jury concerning the primary burden of the stevedore to protect longshoremen from hazardous conditions that had developed during cargo operations. *Id.* at 119, 120. Instead, the trial court, in direct contrast to the mandate of this Court in *Scindia,* instructed the jury that the shipowner had a continuing duty of care in cargo operations. *Id.* at 116 n.3. Additionally, the trial court instructed the jury according to traditional negligence concepts, as opposed to the relative duties imposed by *Scindia.* Finding error, the Second Circuit reversed and remanded, holding that the instructions were inadequate under *Scindia,* since they misled the jury to believe that the shipowner was required to monitor the stevedore's work.

Earlier, the Eleventh Circuit, addressing the identical issue posed in the instant case, had reached the same conclusion. In *Hunter v. Reardon Smith Lines, Ltd.,* 719 F.2d 1108 (11th Cir. 1983), *cert. denied,* 467 U.S. 1205 (1984), a longshoreman contended that the shipowner was liable for his injuries because the accident occurred in an area of the vessel under the active control of the shipowner and, alternatively, during stevedoring operations which were dangerous, with the result that the shipowner should have intervened to protect him. On appeal from a jury verdict entered in favor of the longshoreman, the shipowner contended that the failure of the district court to give instructions with respect to the complete duties of both the shipowner and stevedore was erroneous. The Eleventh Circuit agreed, holding:

> Although the trial court here may have properly charged the jury as to the primary nature of the stevedore's responsibility during cargo operations with respect to the discovery of *unknown* dangers, *it failed to instruct the jury that the stevedore retains the primary responsibility even with respect to dangers which are known to the shipowner. Reardon Smith requested, and was entitled to, such instructions. We thus conclude that the district court erred.* The error is significant because the trial court focussed on Reardon Smith's duty with respect to *known* dangers. The

> Supreme Court in *Scindia* expressly held that the jury should be made aware of the 'duties placed on the stevedore and the vessel's justifiable expectations that those duties will be performed.'

Id. at 1112 (quoting *Scindia*, 451 U.S. at 176) (emphasis in original and added); *See also Clark v. Bothelho Shipping Corp.*, 784 F.2d 1563, 1566 (11th Cir. 1986); *Helaire v. Mobile Oil Co.*, 709 F.2d 1031, 1040 (5th Cir. 1983) (jury instructions required concerning stevedore's duties).

The Fourth Circuit's decision approves the proposition that Evisea's theories of defense entitled it to have the jury instructed as to the relative duties outlined in *Scindia* and specifically that the stevedore has the primary responsibility for the safety of its employees during stevedoring operations. As the Fourth Circuit's decision is consistent with the reasoning of both *Kakavas* and *Hunter, see Hodges*, 801 F.2d at 686, there is no conflict between it and the circuit courts addressing the issue presented in Hodges' Petition.

In a further attempt to justify review, Hodges claims that the area of the No. 3 cargo hold was under the "active control" of the shipowner at the time of the accident and, therefore, there was no need for the district court to give the jury instructions called for by *Scindia*. Contrary to the dictates of *Scindia*, Hodges contends that it is unnecessary to instruct the jury that the primary obligation for the safety of longshoremen is that of the stevedore, and the shipowner's duty to intervene only arises when it knows of a danger to which the longshoremen are being exposed by the stevedore. Hodges has cited four cases which purportedly support his position that there is a conflict among the circuits. Not only is Hodges incorrect when he asserts that the area of the No. 3 cargo hold was under the "active control" of the shipowner at the time of the injury, but his reliance on the cases that he cites is misplaced.

In *Davis v. Partenreederei M.S. NORMANNIA*, 657 F.2d 1049 (9th Cir. 1981), a longshoreman was injured when he was struck by cargo being discharged from the vessel, as he walked off the gangway. The court found that once the shipowner ap-

preciated the continuing danger posed by its own positioning of the gangway, it had a duty to intervene and remedy the dangerous condition. In striking contrast, no evidence was presented that Evisea had any knowledge that Hodges would be exposed to the open hatch in the No. 3 upper tween deck.

In *Sarauw v. Oceanic Navigation Corp.*, 655 F.2d 526 (3d Cir. 1981), *cert. denied,* 456 U.S. 914 (1982), the shipowner, who was supposed to place a watch on the gangway which it knew was being used by longshoremen as well as all others traversing to and from the vessel, was held liable, because it should have recognized the defect in the gangway, and intervened to correct it. *Sarauw* is distinguishable because the shipowner was found liable only upon evidence that it assumed the duty to supervise the stevedore or oversee his work area, and the shipowner failed to intervene in the face of obvious danger. Hodges presented no evidence of shipowner involvement in, or control over, the stevedore's work area, and the record is devoid of any evidence that Evisea knew Hodges would stray into an area in which the stevedore had concluded its work and had so declared to the ship's crew.

Hodges' suggestion that *United States Fidelity & Guaranty v. Jadranska Slobodna Plovidba,* 683 F.2d 1022 (7th Cir. 1983), supports a conflict does not withstand close scrutiny. The issue addressed in the language from *Jadranska* cited by Hodges was not whether *Scindia* "appl[ied] to injuries occurring in non-work areas which remain under the active control of the shipowner." (Hodges Pet. at 15). Rather, the issue addressed by that portion of the *Jadranska* opinion cited by Hodges was whether *Scindia* applied to *areas* of the ship under the ship's control, as well as *equipment* operated by the ship's crew. Moreover, Hodges' contention that *Scindia* did not apply in *Jadranska* is erroneous, since the Seventh Circuit affirmed the necessity for instructing the jury in accordance with the duties outlined in *Scindia. Jadranska,* 683 F.2d at 1026-27. In fact, the jury instructions approved in *Jadranska* are essentially the same as those required by the Fourth Circuit in this case.

Hodges also misapprehends the holding of *Hartford Accident & Indemnity Co. v. Oceancarrier Shipholding of Belgium N.V.,*

799 F.2d 1093 (5th Cir. 1986). The *Hartford* decision affirms the holding of *Scindia,* interpreted through a previous opinion in the Fifth Circuit, that "once loading operations have begun, the vessel owner can be held liable for injuries to employees of the stevedore resulting from open and obvious dangers *only* in the event of actual knowledge of the danger *and actual knowledge* that he cannot rely on the stevedore to remedy the situation." *Id.* at 1097 (quoting *Helaire v. Mobil Oil Co.,* 709 F.2d 1031, 1038-39 (5th Cir. 1983) (emphasis in original)). Hodges presented no evidence that suggests that the *Hartford* decision applies to the facts of this case. Moreover, the *Hartford* decision in no way addresses the issue of what constitutes proper jury instructions under *Scindia.*

CONCLUSION

At trial, in the Fourth Circuit and now in his Petition for a Writ of Certiorari, Hodges seeks to limit the holding in *Scindia* to the narrow factual scenario that arose in that landmark case by disregarding the standard of care and the relative roles of a shipowner and stevedore meticulously outlined by this Court, and to substitute general standards of negligence. Such a position, if adopted, would emasculate *Scindia* and obliterate the blueprint that this Court has set forth to serve as a guide in developing a uniform body of law for cases arising under § 905(b) of the LHWCA. It would also be a retreat toward the unseaworthiness concepts that were abolished by the 1972 Amendments to the LHWCA. Neither this Court nor any circuit court has adopted the restrictive approach suggested by Hodges.

The Fourth Circuit properly applied *Scindia*; it requires no re-examination; there is no conflict among the decisions of the various circuit courts on this point; and the case presents no important question of federal law that has not been decided. Accordingly, Evisea respectfully requests this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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